Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

MIDWEST DEVELOPMENT, INC.,
PIUS REIGER and LEROY HILT,

Petitioners,

v.

FLAMINGO REALTY, INC. and
TERRY FIELDS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state appellate court's unexpected decision giving a party no prior (or subsequent) opportunity to anticipate or assert his claims or defenses denies the litigant "an opportunity for full and fair litigation" of his rights under the Fourteenth Amendment.

RULE 29.1 STATEMENT

Petitioner Midwest Development, Inc., a Nevada corporation, has no parent corporations and no corporate subsidiaries.

PARTIES TO THE PROCEEDING

Parties to the proceeding in the court below were Midwest Development, Inc., Torosan, Inc., a Nevada corporation, Pius Reiger and Leroy Hilt. Torosan, Inc. is not a party to the proceeding in this Court.

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PRELIMINARY STATEMENT

Midwest Development, Inc., Pius Reiger and Leroy Hilt respectfully petition for the issuance of a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINION BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-20a) is reported at 110 Nev. Adv. Opn. 115, 879 P.2d 69. The order denying rehearing (Pet. App. 21a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on August 10, 1994. A timely petition for rehearing was denied on December 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * * .

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall * * * deprive any person of life, liberty or property, without due process of law; * * * .

STATEMENT OF THE CASE

1. On February 4, 1991, respondents Flamingo Realty, Inc. and Terry Fields filed a civil complaint in the Eighth Judicial District Court, Clark County, Nevada, against petitioners Midwest Development, Inc., its principal shareholders Pius Reiger and Leroy Hilt, as well as Torosan, Inc.,[1] alleging breach of contract, fraud and fraudulent conveyance (Pet. App. 1a-3a). The gravamen of the complaint concerned a real estate brokerage commission allegedly owed to respondents in connection with the sale of a forty five (45) acre parcel of real property owned by petitioners in Las Vegas, Nevada (2a).

In May 1990, Midwest decided to sell its parcel of land for a net price of $5.25 million (Pet. App. 2a). Fields approached Midwest in early September 1990, offering to provide a "ready, willing, and able" purchaser (*id.*). Midwest executed in favor of Fields a nonexclusive listing agreement reciting a "list price" of $5.75 million and a realtor's commission of 8.75% (*id.*). The list price, less the commission, would have netted Midwest its desired $5.25 million return (*id.*). The listing agreement, executed on September 7, 1990, terminated by its own terms on September 20, 1990 (2a-3a).

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[1] Torosan, Inc. is not a party to the proceeding before this Court. *See* Parties To The Proceeding, *supra*, at ii.

Fields thereupon delivered Midwest a purchase offer of $5.75 million from Bodysonic, a Nevada corporation whose primary shareholder and officer was a Japanese businessman. Bodysonic's offer, however, was contingent upon approval of a "joint venture/partnership agreement" between buyer and seller (2a). Despite intense negotiations, the parties were unable to reach agreement on the joint venture, and the businessman returned to Japan without closing the sale (*id.*).

In late 1990, Bodysonic submitted to Midwest a second purchase offer of $5.325 million (3a). This second offer contained a provision that Midwest would be responsible for Fields' commission (*id.*). Midwest submitted a counteroffer agreeing to $5.325 million as the net price but omitting the paragraph relating to Fields' commission (*id.*). By the parties' own admissions, the only impediment to closing the transaction was Fields' commission (*id.*). Ultimately, in January 1991, Midwest sold the property to Torosan, Inc. for $5.3 million. Torosan thereupon immediately resold the property to Bodysonic for $5.325 million (*id.*). Upon Midwest's refusal to pay her commission, Fields commenced suit against Midwest, its principals and Torosan (2a-3a).

After a bench trial, the district court found that Fields had failed to prove the necessary elements of her claims and that she had failed to produce a "ready, willing, and able" purchaser according to the terms of the expired September 1990 listing agreement (3a-4a). Nevertheless, the court found that Fields had been the procuring cause of the sale and was therefore entitled to some compensation (4a).

Reopening the trial for the limited purpose of hearing expert evidence to determine the reasonable value of Fields' services, the district court rejected the conclusion of Fields' expert – that the customary value of these services usually was between 8 and 10 percent of the property's selling price – because the expert conceded that his opinion was based upon his belief that Fields had complied with the terms of a standard percentage-based listing agreement (4a). The district court relied instead upon the determination of Midwest's expert that Fields' compensation should properly be calculated by reference to an hourly rate, given Fields' "experience, income, the quality and quantity of services performed, duration of the services and other factors" (*id.*). Based upon a *quantum meruit* assessment of Fields' services, the district court rendered an award in her favor of $107,688 (*id.*).

2. Fields appealed the district court judgment to the Supreme Court of Nevada, which reversed as to the measurement of damages under *quantum meruit* (Pet. App. 5a-9a). Concluding that Fields had not been compensated in accordance with the customary method and rate of compensation in the real estate industry (6a), the majority determined that the terms of the (expired) original listing agreement should have been the measure of damages, finding that the contractual terms were within the customary practice for commissions in the real estate industry (7a). While it conceded that the district court was not "unreasonable" in its determination that the 8.75% commission specified in the original agreement was not applicable under a *quantum meruit* analysis because that agreement was never consummated (8a), the majority

concluded nevertheless, upon its own *sua sponte* rebalancing of equitable factors, that the "customary" commission in the industry should be applied, despite Midwest's consistent position throughout the course of negotiations that it realize a net sales price of $5.25 million, because Fields was deemed the "procuring cause" of the ultimate sale (9a). Accordingly, she was awarded damages in the amount of $450,000 (8a, 9a, 14a).

3. Judge Young concurred in part and dissented in part (Pet. App. 15a-20a). Agreeing that the district court had used the wrong *quantum meruit* valuation method, Judge Young nevertheless disagreed with the majority's abandonment of its customary role as an appellate tribunal deciding issues of law rather than fact by having proceeded to summarily reweigh damages issues that are specifically reserved for the trier of fact on remand (15a, 18a-20a).

Observing that the majority had summarily quadrupled plaintiff's recovery, Judge Young disagreed with the majority's substantive determination that percentage-based brokerage commissions represented the only "customary practice" in the real estate industry. To the extent the majority chose to recalculate damages, it should more properly have applied a "net listings" or "flat fee" commission as the appropriate common standard in this case (15a-16a, 18a). Noting the majority's disregard of the "bedrock" principle of contractual damages that a litigant may recover only such damages as the contract would provide (16a, 18a-19a), Judge Young determined that Fields' recovery, in the absence of a viable contract, was limited in *quantum meruit* to the amount the sale would have provided (*id.*). The ultimate sale price in this case

thus did not allow for the percentage-based commission awarded by the majority (*id.*).

More importantly, Judge Young chided his colleagues for their virtually unprecedented action in summarily recomputing damages, rather than remanding the proceeding to the district court to make the necessary factual determinations (15a, 18a-20a). Characterizing the majority as establishing "with no little spirit of innovation" (20a) a *quantum meruit* remedy on appeal, Judge Young underscored that the district judge heard the testimony of the parties and evaluated the witnesses and the trial evidence. He concluded that the district judge thus was in a far better position to resolve the inconsistencies in the trial record and properly should be given the opportunity to make the equitable determination of which method of commission – percentage-based or flat-fee – should be awarded in this case (18a-20a).

HOW THE FEDERAL QUESTION WAS RAISED

4. Midwest, Reiger and Hilt filed a timely petition for rehearing in the Supreme Court of Nevada. Noting that the majority of the court had made a 400% modification of the district court's damages award, petitioners argued that the court had exceeded its appellate jurisdiction by *sua sponte* recomputing damages without remanding the matter to the district court to make this fact-intensive determination and without allowing petitioners the opportunity to respond and present evidence to the

fact-finding tribunal on the precise computation of damages. Petitioners argued that the majority's effective preclusion of review of its unprecedented (and wholly unanticipated) *sua sponte* damages award, combined with the parties' lack of adequate notice and opportunity to be heard prior to its *sua sponte* recomputation of damages on appeal, resulted in a denial of petitioners' rights to procedural due process in violation of the Fourteenth Amendment to the United States Constitition. The Supreme Court of Nevada denied rehearing on December 30, 1994 (21a).[2]

REASONS FOR GRANTING THE WRIT

A STATE APPELLATE COURT'S UNEXPECTED DECISION GIVING A PARTY NO PRIOR OPPORTUNITY TO ANTICIPATE OR ASSERT HIS CLAIMS OR DEFENSES DENIES THE LITIGANT "AN OPPORTUNITY FOR FULL AND FAIR LITIGATION" OF HIS RIGHTS UNDER THE FOURTEENTH AMENDMENT

The Supreme Court of Nevada's summary (and unexpected) final resolution of the damages issue in this case – wherein it *sua sponte* recomputed the damages under its new rule without remanding to the trial court for further proceedings and without giving the parties prior notice

[2] The order of the Supreme Court of Nevada denying rehearing is reproduced *infra* at Pet. App. 21a. Copies of the motion papers filed in connection with the rehearing application (Midwest's Rehearing Petition, dated August 29, 1994; Fields' Answer to Petition, dated September 1, 1994) have been lodged with the Clerk of this Court.

and an opportunity to brief and argue the matter – denied petitioners the minimal due process to which they were entitled under the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). This summary (and unanticipated) final disposition of the merits thus denied petitioners precisely the "opportunity for full and fair litigation" of their claims by the state court that this Court in another context has held may entitle the litigant to independent federal review. *Stone v. Powell*, 428 U.S. 465, 494 (1976).[3]

As this Court has reiterated on innumerable occasions, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

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[3] This issue is properly before this Court on certiorari. A federal question is deemed properly raised in the state courts – sufficient for this Court to entertain jurisdiction over the controversy – even where the issue is raised for the first time in a rehearing petition in the state appellate court, where "the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question." Robert L. Stern *et al.*, *Supreme Court Practice* § 3.17(c) at 129 & nn.43 & 44 (7th ed. 1993) (and cases collected therein); *Brinkerhoff-Faris Trust Co.*, 281 U.S. at 677-78; *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935); *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in the denial of certiorari).

Here, the Nevada high court never advised the parties that it contemplated altering its pre-existing rule of law regarding the substantive basis upon which real estate brokerage commissions were to be awarded. Moreover, it thereupon proceeded summarily to recalculate damages under the new rule without giving the parties, or the trial court (which heard the witnesses and made the original equitable determination), any further opportunity to address argument or additional evidence which might have substantial bearing on the proper balancing of the equitable considerations which underlay resolution of the parties' respective claims. Such a summary (and unanticipated) procedure by a state's highest court was clear constitutional error under the Fourteenth Amendment. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 127 (1991) ("lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned").

In the context of federal habeas corpus review of state criminal proceedings, this Court has taken the position that while federal courts ordinarily will not review the merits of state courts' Fourth Amendment determinations, exception is made where the state courts have not afforded the litigant "an opportunity for full and fair litigation" of those claims before a state tribunal. *Stone v. Powell*, 428 U.S. at 494. In those exceptional circumstances, the federal courts will entertain those claims on the merits. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 371, 375 (1986).

Indeed, in procedural situations directly analogous to that of the case at bar, various federal courts have held

that where state appellate courts have *sua sponte* decided claims on issues that the parties have neither briefed, argued nor assumed to be raised in the case, the state courts have denied the aggrieved litigant the opportunity to fully and fairly litigate his claims in state court sufficient to entitle relitigation in federal court. *See, e.g., Riley v. Gray*, 674 F.2d 522, 527 (6th Cir. 1982); *Bailey v. Duckworth*, 699 F.2d 424, 425 (7th Cir. 1983); *United States ex rel. Bostick v. Peters*, 3 F.3d 1023, 1026-29 (7th Cir. 1993).

In *Riley*, the Sixth Circuit held that where a state appellate court had *sua sponte* addressed a Fourth Amendment standing issue in an "unanticipated and unforeseeable" manner without remanding the case to the trial court to afford the litigant an opportunity to establish his standing, the litigant was "deprived . . . of an opportunity to fully litigate his claim." 674 F.2d at 527. Similarly, in *Bostick*, "the unanticipated and unforeseeable application of a rule on appeal prevented the state courts from properly considering the merits of the petitioner's claim. This failure in the state's procedural mechanism . . . denied Bostick the opportunity for full and fair litigation of his claim." 3 F.3d at 1029. *See also Bailey*, 699 F.2d at 425 (accord); *Gilbert v. Parke*, 763 F.2d 821, 823 (6th Cir. 1985) (even if State "in the abstract" provides full and fair procedural mechanism, "failure of that mechanism" in particular case constitutes denial of opportunity for full and fair litigation of claim).

Nor does the fact that the ultimate question at issue is a matter of state substantive law insulate the state court's method of disposition from federal review. As this Court recently noted in *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510, 2519-20 (1993), the Supremacy Clause does

not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Thus, while Nevada "is free to choose which form of relief it will provide . . . that relief [must] satisf[y] the minimum federal requirements we have outlined." 113 S.Ct. at 2520. "State law may provide relief beyond the demands of federal due process (citation omitted), but under no circumstances may it confine petitioners to a lesser remedy (citation omitted)." *Id.*

Accordingly, petitioners' federal rights under the Fourteenth Amendment clearly have been violated where the state's highest court has rendered an unexpected decision (albeit on a question of state law) but has given the litigants no prior (or subsequent) opportunity to assert their claims or defenses in response thereto. Such summary adjudication – and final resolution – denied petitioners a constitutionally adequate "opportunity for full and fair litigation" of their rights under the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1995

OPINION OF THE NEVADA SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

FLAMINGO REALTY, INC., A NEVADA CORPORATION; AND TERRY FIELDS, INDIVIDUALLY AND IN HER CAPACITY AS AN AGENT OF FLAMINGO REALTY, INC., Appellants, v. MIDWEST DEVELOPMENT, INC., A NEVADA CORPORATION; TOROSAN, INC., A NEVADA CORPORATION; PIUS REIGER; AND LEROY HILT, Respondents.	No. 23544 (Filed Aug. 10, 1994)

Appeal from money judgment entered pursuant to a bench trial. Eighth Judicial District Court, Clark County; William P. Beko, Senior Judge.

Modified in part; affirmed in part; reversed in part.

K. Michael Leavitt, Jason G. Langess and David Rivers, Las Vegas, for Appellants.

Cherry, Bailus & Kelesis, Las Vegas, for Respondents Midwest, Reiger and Hilt.

Edward R.J. Kane, Las Vegas, for Respondent Torosan.

OPINION

By the Court, STEFFEN, J.:

THE FACTS

Respondent Midwest Development, Inc. ("Midwest") owned a 45-acre parcel of real property situated in Las Vegas. Respondents Pius Reiger and Leroy Hilt were the principal shareholders of Midwest. In May of 1990, Midwest decided to sell the parcel for a net price of $5,250,000.00. Appellant Terry Fields[1] approached Midwest in early September of 1990 and offered to provide a "ready, willing, and able" purchaser of the subject property. Thereafter, Midwest executed in favor of Fields a nonexclusive listing agreement that recited a "list price" of $5,750,000.00 and a realtor's commission of 8.75%. The list price, less the commission, would have netted approximately $5,250,000.00 to Midwest.

Fields immediately delivered to Midwest a purchase offer of $5,750,000.00 from Bodysonic, a Nevada corporation whose primary shareholder and officer was a Japanese businessman by the name of Kyota Yamada. However, Bodysonic's purchase offer was contingent upon the "approval of a joint venture/-partnership agreement by and between the buyer and seller." After intensive negotiations, the parties were unable to reach an agreement regarding the joint venture and Yamada returned to Japan without closing the sale. The listing

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[1] Fields was working as an agent for Appellant Flamingo Realty at all relevant times. For stylistic ease and clarity we will refer to the two parties as "Fields."

agreement, which was executed on September 7, 1990, terminated by its own terms on September 20, 1990.

In late 1990, Bodysonic submitted a second purchase offer in the amount of $5,325,000.00. Fields had continuously worked with Yamada in preparing the offer and finding an unrelated joint venturer to aid in developing the property. Bodysonic's offer contained a provision stating that Midwest would be responsible for paying Fields' commission. Midwest delivered a counteroffer to Bodysonic specifying the $5,325,000.00 as a net price[2] and omitting the paragraph relating to Fields' commission. By the parties' own admissions, the only impediment to closing the transaction was Fields' commission.

Midwest ultimately sold the property to respondent Torosan, Inc., ("Torosan") for $5,300,000.00, and Torosan immediately resold the property to Bodysonic for $5,325,000.00. When Fields learned of the latter sale, she demanded that Midwest pay her a commission. Midwest refused, prompting Fields to file a complaint against Midwest, its principals, and Torosan for fraud, fraudulent conveyance, and breach of contract. Torosan responded by filing a counterclaim against Fields for its attorney's fees and the costs of defending a "frivolous and/or meritless lawsuit."

After a bench trial, the district court found that Fields had failed to prove the necessary elements of her claims,

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[2] After the first negotiations failed, Midwest incurred approximately $75,000.00 in predevelopment architecture and engineering fees. As a result, Midwest increased the selling price to $5,325,000.00 in order to realize its earlier net requirement of $5,250,000.00.

and awarded Torosan attorney's fees and costs as damages on its counterclaim. The court also found that Fields had failed to produce a "ready, willing, and able" purchaser according to the terms of the expired listing agreement. Despite the foregoing, the court did find that Fields had been the procuring cause of the ultimate sale and that she was entitled to compensation. Because there was insufficient evidence in the record to determine the amount to award Fields, the court reopened the trial for the limited purpose of determining the reasonable value of Fields' services.

Fields' expert, Ron Reiss, testified that the customary value of Fields' services was somewhere between 8 and 10 percent of a property's selling price. Reiss buttressed his testimony with significant evidence of similar listings and transactions. However, his opinion was based upon his belief that Fields had complied with the terms of a standard, percentage-based listing agreement. Respondents' expert witness, Shirley Rappaport, conceded that real estate commissions are normally determined as a percentage of the selling price. Rappaport nevertheless analyzed Fields' "experience, income, the quality and quantity of services performed, duration of the services and other factors" and concluded that Fields' compensation could be calculated by reference to an hourly wage. The district court accepted Rappaport's evidence and determined that "Fields devoted at least 40 hours per week for a period of six months for $92,304.00, and at least 20 hours per week for two months for $15,384.00, or a total of $107,688.00."

DISCUSSION

Fields raises four assignments of error on appeal: (1) the court used an inappropriate measure of damages under *quantum meruit;* (2) the court erred in finding insufficient evidence of fraud; (3) the court erred in awarding attorney's fees and costs to Torosan; and (4) the court erred in refusing to pass Torosan's costs through Fields and to the nonprevailing defendants Midwest, Reiger and Hilt.

1. The appropriate measure of damages under quantum meruit

A district court is given wide discretion in calculating an award of damages and an award will not be disturbed on appeal absent an abuse of discretion. Parsons Drilling, Inc. v. Polar Resources Co., 98 Nev. 374, 377, 649 P.2d 1360, 1363 (1982). In the instant case, the parties recognize that the proper measure of damages under a *quantum meruit* theory of recovery is the "reasonable value of [the] services." Morrow v. Barger, 103 Nev. 247, 252, 737 P.2d 1153, 1156 (1991). Unfortunately, the parties disagree on the best method of measuring the "reasonable value" of Fields' services.

In Florey v. Sinkey, 77 Nev. 275, 362 P.2d 271 (1961), the respondent was the "procuring cause" of a sale of mining property. Based upon an implied agreement that the sellers would pay the respondent "the reasonable value of his services," the trial court awarded the respondent 10% of the sale proceeds. In affirming the award, we concluded that "the sum found to be due . . . as compensation for his services, under the established custom of

the mining locality, became the reasonable value of such services." *Id.* at 279, 362 P.2d at 273. Thus, we have previously recognized the applicability of "established customs" when determining the "reasonable value" of a real estate agent's services. We are persuaded that the standard used in *Florey* should have been utilized in the instant case, thereby compensating Fields based upon the customary method and rate of compensation in the real estate industry. *See also* Needs v. Hebener, 797 P.2d 146, 151-52 (Idaho Ct. App. 1990) (the reasonable value of services is determined by the nature of the work and the customary rate of pay for such work in the community).

The district court abused its discretion when it expressly refused deference to the manner in which real estate agents are customarily paid.[3] Both experts testified that real estate agents are not customarily paid an hourly wage. In fact, Rappaport testified as follows concerning the hourly wage schematic she presented to the court:

> I was looking at something other than a commission which I have never really done before, and it's really not that normal in the real estate business, but this is the only way I could see that I could equate an income or something reasonable instead of giving a commission is basing on maybe what they had done before or what a good commercial salesperson could make or does make and equate it to hours.

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[3] The district court stated at one point: "I'm not interested in what is customarily done. I'm interested in learning what just compensation would be based upon the services performed by Terry Fields."

To compound the error, Fields was unable to estimate the number of hours she worked on the sale and the district court simply estimated the hours Fields "could have worked," and multiplied those hours by an arbitrary hourly rate.

Having concluded that the trial court erred in fixing Fields' compensation, it becomes necessary to determine the value of Fields' services based upon the customary methods of compensating real estate professionals. The primary source for resolving this issue is the original listing agreement between Fields and Midwest. The district court found that the parties agreed to a "net listing" of $5,250,000.00. Substantial evidence of record supports the district court's finding. The original agreement is an important part of our analysis because a real estate agent who is the "procuring" or "inducing" cause of a sale, is entitled to the *agreed commission,* irrespective of who makes the actual sale or supplies the terms thereof. Schneider v. Biglieri, 94 Nev. 426, 427, 581 P.2d 8, 9 (1978) (citing Bartsas Realty, Inc. v. Leverton, 82 Nev. 6, 409 P.2d 627 (1966)); *see also* Herrman v. Blase, 77 Nev. 127, 133, 359 P.2d 745, 748 (1961) (the agreed compensation may become the amount of *quantum meruit*).

We also conclude from the record that the compensation agreed to by both parties was within the customary practice for establishing a reasonable commission in the real estate industry. Although both experts testified that the percentage-based commission is prevalent in the industry, Fields' own expert testified that "net listings" are common as well. Unfortunately, in fashioning a transaction through Torosan to Bodysonic without provision

for a commission to Fields, Midwest foreclosed the propriety of using Midwest's net listing requirement as a fair measure of the reasonable value of Fields' services. Fields originally presented to Midwest an offer to purchase from Bodysonic for $5,750,000.00 with an agreed commission of 8.75% of the selling price. Although the parties were unable to resolve certain impediments to that sale, Bodysonic thereafter offered to purchase the property for $5,325,000.00 with the proviso that Midwest pay Fields her commission. Rather than arranging for payment of a commission to Fields, Midwest accomplished the sale to Bodysonic through Torosan for $5,300,000.00. The difference between the original proffered purchase price of $5,750,000.00 and the eventual sales price to Torosan of $5,300,000.00 is $450,000.00, or nearly 8.5% of the actual sales price. This figure is well within the usual fee of 8-10% testified to by Mr. Reiss, and is less than the 8.75% fee originally agreed to in the listing agreement between Fields and Midwest.

The district court did not unreasonably conclude that the 8.75% commission specified in the original agreement was inapplicable under a *quantum meruit* analysis because that agreement was never consummated. Nor was the trial judge unreasonable in concluding that a "net listing" approach would be unfair because it would have yielded a commission of "only $5,000.00" [sic] (the difference between the net listing of $5,250,000.00 and the sale to Torosan of $5,300,000.00, actually would have yielded a commission of $50,000.00). We are nevertheless persuaded that the following complex of factors predominate: (1) the district court found that Midwest, at least through knowledge imputed through its attorney, knew

that Fields was continuing her efforts to effectuate a sale to Bodysonic; (2) Bodysonic's second offer to purchase for $5,325,000.00 included a proviso that Midwest pay Fields' commission; (3) Midwest thereafter consummated the sale to Bodysonic through Torosan (a newly formed Nevada corporation whose stock was owned by respondent Hilt's daughter and two sons) without any provision for payment of a commission to Fields; and (4) it was not the intention of any of the parties that Fields' services were to be gratuitous. On balance, we conclude that the combination of circumstances present in this case conduce in favor of applying the customary commission in the industry, despite Midwest's firm resolve to realize a net sales price of $5,250,000.00. In other words, as the procuring cause of the sale, we are persuaded that Fields' position is endowed with a greater measure of equity and principle than that of Midwest.

Moreover, we are unable to endorse the district court's attempt to reach a reasonable award for Fields through a speculative process of determining the hours Fields "could have" expended on the sale multiplied by an arbitrary hourly charge. We are persuaded that an award of $450,000.00 to Fields is justified by the evidence of record and the principles discussed above. She was the procuring cause of a very substantial and highly profitable sale, and the victim of an attempt to utilize the benefit of her efforts without paying her a commission. It is both just and equitable that Fields receive damages within the range of the parties' original agreement and that which is customary in the industry. We therefore modify the district court's award of damages to Fields by increasing it to the sum of $450,000.00.

2. The fraud claims

Fields asks us to reweigh the evidence presented at trial and conclude that the district court erred when it found insufficient evidence to support her claims of fraud and fraudulent conveyance. The sale of the subject property from Midwest to Torosan, and from Torosan to Bodysonic is admittedly suspect and the circumstantial evidence supplies a strong basis for suspecting bad faith on the part of the respondents. However, the district court considered the voluminous evidence presented at trial and evaluated the credibility of each witness before finding against Fields on her allegations of fraud. Specifically, the district court found the defendants' "explanations which contradicted the circumstantial evidence upon which the fraud allegations were based were not rebutted in any way." We have reviewed the record and are unable to conclude that the district court's findings are clearly erroneous. Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990). It is a basic principle of appellate review that when substantial evidence supports the lower court's finding, as it does in this case, we will not disturb the result "despite suspicions and doubts based upon conflicting evidence." Allen v. Webb, 87 Nev. 261, 266, 485 P.2d 677, 679 (1971). The fact that we may have arrived at a different conclusion based upon our review of the cold record does not justify overruling the district court's judgment with respect to the fraud claims.

3. Attorney's fees

Torosan's counterclaim alleged that Fields' complaint was brought "without reasonable ground and/or to

harass" Torosan. At the conclusion of Fields' case-in-chief, the district court simply invited Torosan to submit a summary of its fees and costs; the counterclaim was never tried. The court then awarded Torosan attorney's fees and costs under the following justification:

> Torosan has counterclaimed the plaintiffs for their attorney's fees and expenses in defending this litigation. Since plaintiffs have not recovered any damages against Torosan, Torosan is entitled to an award for its costs incurred as the prevailing party, amounting to $3,618.37 and attorney's fees in the sum of $18,985.02, all of which the court finds to be reasonable.

We have consistently held that attorney's fees are only available when authorized by a "rule, statute, or contract." *See. e.g.*, Ace Truck v. Kahn, 103 Nev. 503, 512 n.4, 746 P.2d 132, 138 (1987). Within the stated criteria, the decision to award attorney's fees is left to the sound discretion of the district court. County of Clark v. Blanchard Contr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). However, a district court may abuse its discretion when it clearly disregards guiding legal principles. Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 562-73, 598 P.2d 1147, 1149 (1979) (citing Goodman v. Goodman, 68 Nev. 484, 489, 236 P.2d 305, 307 (1951)).

Although the counterclaim appears to be a recitation of NRS 18.010(2)(b),[4] the district court specifically

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[4] NRS 18.010(2)(b) provides:

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:

awarded attorney's fees as damages under Torosan's counterclaim. Hence, the award was not made pursuant to a "rule, statute or contract," and constitutes an abuse of discretion. In the absence of a contract or rule, a prevailing defendant/-counterclaimant may only recover attorney's fees when the requirements of NRS 18.010(2)(b) are met. To allow attorney's fees as an element of damages from an ostensible common-law cause of action we have not yet embraced would swallow the purposes for the attorney's fees statute. In any event, our review of the record indicates that Torosan was properly named as a defendant to the underlying action; therefore, NRS 18.010(2)(b) is inapplicable and the award of attorney's fees is reversed.

4. Costs

Torosan prevailed against Fields and is unquestionably entitled to costs pursuant to NRS 18.020(3).[5] *See* Randono v. Turk, 86 Nev. 123, 133, 466 P.2d 218, 224 (1970)

(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought without reasonable ground or to harass the prevailing party.

[5] NRS 18.020 provides in pertinent part:
Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases:

3. In an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500.

(the statutory award of costs is mandatory). Unfortunately, the method by which the district court awarded Torosan's costs failed to recognize the need for Torosan to file a memorandum of costs as required by NRS 18.110(1).[6] Indeed, the district court specifically found that compliance with the statute was unnecessary because costs were awarded as damages under Torosan's counterclaim and not pursuant to the statute regarding costs. Although we recognize that noncompliance with NRS 18.110 would ordinarily require the forfeiture of costs, under the peculiar circumstances of this case we will allow the cost award to stand since Fields must prevail on her claim that the award should be passed through her to the nonprevailing defendants. Therefore, we affirm the award of costs in the amount of $3,618.37.

Finally, as noted above, Fields contends that the district court erred when it failed to pass Torosan's costs through her to the nonprevailing defendants. We agree. In the analogous case of Schouweiler v. Yancey Co., 101 Nev. 827, 712 P.2d 786 (1985), the plaintiff prevailed

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[6] NRS 18.110(1) provides:

> 1. The party in whose favor judgment is rendered, and who claims his costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days after the entry of judgment, or such further time as the court or judge may grant, a memorandum of the items of his costs in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.

against three of the six defendants and this court allowed the plaintiff to recover the taxable costs of the prevailing defendants from the nonprevailing defendants. *Id.* at 832, 712 P.2d at 789. The rule in *Schouweiler* is applicable here. Accordingly, we conclude that Fields may tax the costs of Torosan's defense against respondents Midwest, Reiger and Hilt.

CONCLUSION

For the reasons heretofore discussed, the district court used the wrong measure of damages when it calculated the value of Fields' services. We therefore modify the damages award to Fields by increasing the amount of the award to $450,000.00. The district court's judgment awarding attorney's fees is reversed and vacated, and the award of costs favoring Torosan is affirmed but assessed against the nonprevailing defendants rather than Fields. The judgment entered below with respect to the fraud claims is affirmed. This matter is remanded to the district court for modification of the judgment in accordance with the dictates of this opinion.

/s/ _____, J.
Steffen

We concur:

/s/ _____, C.J.
Rose

/s/ _____, J.
Springer

/s/ _____, J.
Shearing

Young, J., concurring in part and dissenting in part:

Although I concur that the district court used the wrong quantum meruit valuation method, I respectfully disagree with my colleagues' assessment of damages on appeal. Over my several years as a jurist, I have tried to remain true to a fundamental principle of appellate review: courts of appeal should spend their working hours deciding issues of law and not issues of fact. Only on rare occasions and under the most egregious circumstances ("clearly erroneous," "manifestly wrong" or "abuse of discretion") should we disrupt the factual rulings of the district court. It is on even rarer occasions that this court should peruse the record on appeal and redecide issues that are specifically reserved for the trier of fact.

In the instant case, the majority has spurred this dissent by straying from these fundamental concepts and tangling with an animal that is uniquely bred for trial court taming – damages. *See* Nelson v. Reinhart, 47 Nev. 246, 219 P. 554 (1923) (issue of value of services performed by broker is a question uniquely reserved for trier of fact). In an attempt to work justice and arrive at an equitable solution to Fields' claim for quantum meruit, the majority reweighs the evidence that was before the trial court and concludes that Fields is entitled to a $450,000.00 real estate commission. This is an additur of nearly $350,000.00. My colleagues hold that the percentage-based commission represents the customary practice in the industry and drives the brokerage fee quantum meruit determination.

I respectfully submit that the majority's application of this calculation method is erroneous. There is a bedrock principle of contract damages restricting Fields' recovery that is absent from the majority opinion. The litigant can *only* recover damages that the contract would provide. In the absence of a contract, I contend that Fields can *only* recover in quantum meruit what the sale of the investment property would have provided. The ultimate sale to Bodysonic for $5,325,000.00, which the district court held was "procured" by Fields, simply would not allow for a percentage-based commission.

If the majority feels compelled to reevaluate issues of fact and establish a commission amount on appeal, I submit that the proper calculation method would be the "net listings" or "flat fee" commission. Fields' expert testified that this type of commission was customary and common in the industry. This court has even recognized and upheld the net listing commission in the quantum meruit context. *See* Close v. Redelius, 67 Nev. 158, 215 P.2d 659 (1950). Under this type of arrangement, the broker is simply paid a flat fee over and above a prearranged net sales price. In other words, the seller tells the broker, "I must realize a net sale of $5,250,000.00, and any sales price you can obtain over and above this amount is your commission."

Midwest demanded a net sale of $5,250,000.00. Midwest would not consummate any deal if it could not obtain such an amount. Fields realized this fact, Bodysonic realized this fact, and the district judge realized this fact. There are several purchase offers and an expired listing contract lying in a trash bin in Fields' office as a result of Midwest's steadfast demand. Yet after today's

decision, and after Midwest has absorbed the $450,000.00 commission that it must pay Fields, Midwest has obtained a net sale of only $4,875,000.00 ($5,325,000.00 minus $450,000.00). This is $375,000.00 below its demand. Is this equity? Is it fair for Midwest to pay a commission based upon a hypothetical deal that it would never have consummated?

Quantum meruit should not be restrained by such an obdurate shackle as percentage-based commission in every real estate broker fee case. *See, e.g., Close*, 67 Nev. at 167-68, 215 P.2d at 663 (quantum meruit net sale commission was appropriate even though amount was "slightly more than one-half of the charge usually made by a broker for selling business property"); *see also* Romanek-Golub & Co. v. Anvan Hotel Corp., 522 N.E.2d 1341 (Ill. App. Ct. 1988) (affirming five percent quantum meruit commission even though testimony indicated that ten percent commission was customary); and Weichert Co. Realtors v. Ryan, 608 A.2d 280 (N.J. 1992) (in remanding for proper determination of brokerage fee, court holds that reasonable value of fee includes, but is not limited to, customary fees for similar transactions). Quantum meruit is an equitable principle that is applied at the hands of the trial judge after considering the respective positions of the parties. The district court understood that Midwest would never have solidified the sales transaction without netting $5,250,000.00. As a result, the district court specifically rejected a percentage-based commission. The amount was too high and repugnant to the negotiations and efforts of the parties. More importantly, the court realized that the percentage-based commission would

have given life to a listing agreement between Midwest and Fields that was dead and withered on the vine.[1]

Neglecting the foregoing, the majority spreads their hands across the vineyard, breathes life into the listing agreement, and makes wine for Fields. My colleagues conclude that the "primary source for resolving this issue [quantum meruit] is the original listing agreement between Fields and Midwest." Yet in their supporting calculations and rationale, they neglect the very fiber of that agreement. Midwest had to have a $5,250,000.00 net sale.

As I have indicated, if the majority feels some compulsion to establish a commission based upon a paper record, the more appropriate method of valuation is the "net sales" approach. This approach is more consistent with the district court's findings of fact and seems mandated by the months of negotiations throughout which Midwest steadfastly demanded a $5,250,000.00 net sale. If a commission must be determined on appeal, Fields was entitled only to the amount of money Midwest realized over this demand or $75,000.00 (eventual sale price to Bodysonic, $5,325,000.00, minus the net demand of $5,250,000.00). This is a more equitable figure than that generated by the majority and a more accurate reflection of the negotiations that preceded the eventual sale of the

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[1] The original listing agreement binding Fields and Midwest was signed on September 7, 1990. By the agreement's own terms, it expired two weeks later on September 20, 1990, and more than four months before the property was eventually sold to Bodysonic.

investment property. Fields cannot recover anything greater than the sales transaction would provide.

Casting aside any temptation to determine damages on appeal, however, I would remand to the trial court for further proceedings. The district court heard the testimony of the parties, evaluated the witnesses, and contemplated all of the evidence presented at trial. As a result, the district court is in a better position to make the equitable decisions needed to resolve the quantum meruit dilemma presented by this case.

The majority recognizes that both the net sales and percentage-based commissions are customary in the industry. Moreover, we all agree that the district court abused its discretion in assessing damages by neglecting these customary practices. Yet why take that additional step and choose among these two equally acceptable valuation approaches and engage in an application process on appeal? By balancing the equities, I submit that the majority reaches a decision that is contradictory to the facts of this case and the integrity of the district court's decision. For example, my colleagues state that "[u]nfortunately, in fashioning a transaction through Torosan to Bodysonic without provision for a commission to Fields, Midwest foreclosed the propriety of using Midwest's net listing requirement as a fair measure of the reasonable value of Fields' services." They continue and conclude that "Fields' position is endowed with a greater measure of equity and principle than that of Midwest." The majority is suggesting that Midwest was engaged in chicanery and was therefore prohibited from claiming that Fields could only recover a net sales commission. This type of equitable reasoning is contradictory to our conclusion

that the district court properly determined that there was insufficient evidence to support Fields' claims for fraud and fraudulent conveyance. On the one hand, the majority posits that Midwest fashioned a *suspect* deal through Torosan and therefore equity demands a $350,000.00 additur for Fields. On the other, the majority agrees with the trial court that the deal through Torosan was *not suspect* for the purpose of evaluating Fields' fraud-based claims for relief.

This inconsistency aptly illustrates my point that this court is in no position to sift through the record on appeal and make equitable determinations that are best reserved for the trial court. I would remand and allow the district court to assess which party is endowed with the more equitable position and then have the district court determine what type of commission Fields was entitled to – a percentage-based or net sales commission. Both are customary in the industry.

For the foregoing reasons, I respectfully dissent from the portion of the majority opinion that establishes, with no little spirit of innovation, a quantum meruit amount on appeal.

/s/ _____, J.
Young

ORDER DENYING REHEARING

IN THE SUPREME COURT OF THE STATE OF NEVADA

FLAMINGO REALTY, INC., A NEVADA CORPORATION; AND TERRY FIELDS, INDIVIDUALLY AND IN HER CAPACITY AS AN AGENT OF FLAMINGO REALTY, INC., Appellants, vs. MIDWEST DEVELOPMENT, INC., A NEVADA CORPORATION; TOROSAN, INC., A NEVADA CORPORATION; PIUS REIGER; LEROY HILT, Respondents.	No. 23544 (Filed Dec. 30, 1994)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ _____, C.J.
Rose

/s/ _____, J.
Steffen

/s/ _____, J.
Young

/s/ _____, J.
Springer

/s/ _____, J.
Shearing

(2)

No. 94-1596

Supreme Court, U.S.
FILED
APR 25 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

MIDWEST DEVELOPMENT, INC.,
PIUS REIGER and LEROY HILT,

Petitioners,

v.

FLAMINGO REALTY, INC. and
TERRY FIELDS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state appellate court, without a violation of due process of law, may modify a judgment of the trial court by increasing the amount thereof where the record presents all the facts and there were no errors of law?

PARTIES

Petitioner, Midwest Development, Inc. ("Midwest"), is a Nevada Corporation.

Respondent, Flamingo Realty, Inc. ("Flamingo"), is a Nevada Corporation with its principal place of business in Las Vegas, Nevada. Respondent, Terry Fields ("Fields"), is an individual resident of Boulder City, Nevada.

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No. 94-1596

In The

Supreme Court of the United States

October Term, 1994

MIDWEST DEVELOPMENT, INC.,
PIUS REIGER and LEROY HILT,

Petitioners,

v.

FLAMINGO REALTY, INC. and
TERRY FIELDS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Terry Fields and Flamingo Realty, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Midwest Development, Inc.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet.App. 1a-20a) is reported at 110 Nev.Adv.Opn. 115,

879 P.2d 69. The order denying rehearing (Pet.App. 21a) is unreported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In is petition, petitioner Midwest Development, Inc., maintains that the opinion of the Supreme Court of Nevada violated is rights to due process as guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondents Flamingo Realty, Inc. and Terry Fields filed a civil complaint in the Eighth Judicial District Court, Clark County, Nevada, against petitioner Midwest Development, Inc. and others, alleging breach of contract, fraud and fraudulent conveyance. (Pet.App. 1a-3a) The lawsuit stemmed from Midwest's failure to pay Flamingo and Fields a real estate commission which they had earned in connection with the sale of a 45-acre parcel of real property situated in Las Vegas, Nevada. "In May of 1990, Midwest had decided to sell the parcel for a new price of $5,250,000.00. Fields had approached Midwest in early September of 1990 and offered to provide a 'ready, willing, and able' purchaser of the subject property. Thereafter, Midwest executed in favor of Fields a nonexclusive listing agreement that recited a 'list price' of $5,750,000.00 and a realtor's commission of 8.75%. The

list price, less the commission, would have netted approximately $5,250,000.00 to Midwest." (Pet.App 2a)

"Fields immediately delivered to Midwest a purchase offer of $5,750,000.00 from Bodysonic, a Nevada corporation whose primary shareholder and officer was a Japanese businessman by the name of Kyota Yamada. However, Bodysonic's purchase offer was contingent upon the 'approval of a joint venture/-partnership agreement by and between buyer and seller.' After intensive negotiations, the parties were unable to reach an agreement regarding the joint venture and Yamada returned to Japan without closing the sale. The listing agreement, which was executed on September 7, 1990, terminated by its own terms on September 20, 1990. (Pet.App. 2a-3a)

"In late 1990, Bodysonic submitted a second purchase offer in the amount of $5,325,000.00 Fields had continuously worked with Yamada in preparing the offer and finding an unrelated joint venturer to aid in developing the property. Bodysonics offer contained a provisions stating that Midwest would be responsible for paying Fields' commission. Midwest delivered a counteroffer to Bodysonic specifying the $5,325,000.00 as a net price and omitting the paragraph relating to Fields' commission. By the parties' own admissions, the only impediment to closing the transaction was Fields' commission. (Pet.App. 3a)

"Midwest ultimately sold the property to respondent Torosan, Inc., ('Torosan') for $5,300,000.00, and Torosan immediately resold the property to Bodysonic for $5,325,000.00. When Fields learned of the latter sale, she demanded that Midwest pay her a commission. Midwest

refused, prompting Fields to file a complaint against Midwest, its principals, and Torosan for fraud, fraudulent conveyance, and breach of contract. . . . (Pet.App. 3a)

"After a bench trial, the district court found that Fields had failed to prove the necessary elements of her claims, and awarded Torosan attorney's fees and costs as damages on its counterclaim. The court also found that Fields had failed to produce a 'ready, willing, and able' purchaser according to the terms of the expired listing agreement. Despite the foregoing, the court did find that Fields had been the procuring cause of the ultimate sale and that she was entitled to compensation. Because there was insufficient evidence in the record to determine the amount to award Fields, the court reopened the trial for the limited purpose of determining the reasonable value of Fields' services." (Pet.App. 3a-4a)

At the reopened hearing, "Fields' expert, Ron Reiss, testified that the customary value of Fields' services was somewhere between 8 and 10 percent of a property's selling price. Reiss buttressed his testimony with significant evidence of similar listings and transactions. However, his opinion was based upon his belief that Fields had complied with the terms of a standard, percentage based listing agreement. Respondents' expert witness, Shirley Rappaport, conceded that real estate commissions are normally determined as a percentage of the selling price. Rappaport nevertheless analyzed Fields' 'experience, income, the quality and quantity of the services performed, duration of the services and other factors' and concluded that Fields' compensation could be calculated by reference to an hourly wage. The district court accepted Rappaport's evidence and determined that

'Fields devoted at least 40 hours per week for a period of six months for $92,304.00, and at least 20 hours per week for two months for $15,384.00, or a total of $107,688.00.' " (Pet.App. 4a)

Following this decision, Flamingo and Fields appealed to the Supreme Court of Nevada. On that appeal, Flamingo and Fields maintained, *inter alia,* that the district court erred when it failed to award them a commission based upon the written listing agreement. They also contended that the district court committed error when, after finding that Fields was the procuring cause of the parcel's ultimate sale, it failed to utilize the commission figure agreed upon by the parties in their listing agreement as the measure of damages for their recovery under quantum meruit. Specifically, Flamingo and Fields argued "that *quantum meruit* is the reasonable value of services, and that the reasonable value of services is determined first by what was specified in the contract, second by what is usual and customary in the community for like services, and third by the value of the services to the person receiving them. It has been demonstrated in this case that the reasonable value of services as per the contract was 8¾% of the net sales price. . . . " (Appellants' Opening Brief, page 20, lines 8-15)

In deciding this matter, the Supreme Court of Nevada found that "[t]he district court did not unreasonably conclude that the 8.75% commission specified in the original agreement was inapplicable under a *quantum meruit* analysis because that agreement was never consummated." (Pet.App.8a) However, the Nevada Supreme Court did hold that the district court should have

awarded Flamingo and Fields a fee based upon the customary commission in the industry, saying:

> " . . . We are persuaded that an award of $450,000.00 to Fields is justified by the evidence of record and the principles discussed above. She was the procuring cause of a very substantial and highly profitable sale, and the victim of an attempt to utilize the benefit of her efforts without paying her a commission. It is both just and equitable that Fields receive damages within the range of the parties' original agreement and that which is customary in the industry." (Pet.App. 9a)

SUMMARY OF THE ARGUMENT

This case does not present an issue which is appropriate for the Court's exercise of its discretionary jurisdiction. Midwest, both in the district court and in the Nevada Supreme Court, was aware that Flamingo and Fields maintained that they were entitled to a commission which was based upon the commission figure to which the parties had agreed in their original listing agreement. In the district court, Midwest challenged this position by presenting evidence that Fields should be compensated on the basis of an hourly rate. In the Nevada Supreme Court, a similar argument was raised. Because the issue of Fields' right to a fee based upon the commission which was customarily paid in the industry was an issue which was always before both courts and, further, because Midwest was never denied the opportunity to present evidence and argument concerning this issue, and in fact did

present evidence and argument on this point, Midwest's right to due process of law was not violated.

ARGUMENTS AND AUTHORITIES

This case does not present a situation wherein Midwest's constitutional right of due process of law was violated. In the trial court proceeding, Flamingo and Fields had consistently maintained they were entitled to a real estate fee which was based upon that commission figure which had been set forth in the original listing agreement of the parties, i.e., 8¾%. After the district court had found that Fields was the procuring cause for the sale and had reopened the trial for the limited purpose of determining the reasonable value of Fields' services, both Midwest and Fields presented evidence and argument in support of their respective positions. In particular, Fields advanced the testimony of her expert "that the customary value of Fields' services was somewhere between 8 and 10 percent of a property's selling price." (Pet.App. 4a) On the other hand, Midwest was afforded the opportunity to challenge, and did in fact challenge this position, by introducing the testimony of its expert that the reasonable value of Fields' services should instead be calculated "by reference to an hourly wage." (Pet.App. 4a) By like token, in the opening brief which Flamingo and Fields filed with the Supreme Court of Nevada, Fields reiterated this same argument, i.e., "that the reasonable value of services is determined first by what was specified in the contract, (and) second by what

is usual and customary in the community for like services." Again, Midwest was afforded the opportunity to oppose, and did in fact oppose, Fields' argument.

Seen in this light, the manner in which Midwest has characterized the Question which is presently before this Court is wholly unfounded. The decision handed down by the Supreme Court was not "unexpected". Rather, the award which the Supreme Court of Nevada made was one which Flamingo and Fields had sought both in the district court and on appeal. Likewise, neither the district court nor the Supreme Court of Nevada denied Midwest the right to present evidence or argument in opposition to Fields' contention that she was entitled to a fee based upon the commission percentage which customary in the industry. In fact, Midwest did present evidence and argument to the contrary in both courts. Because of this, no due process rights are implicated and this case is governed by the well established rule that an appellate court may and should correct a lower court's judgment or decree by increasing the amount of recovery where all facts necessary to justify a judgment for the correct amount have been found by the trial court, or the facts are not in dispute and could not be varied on a new trial. *Bass v. Ring*, 210 Minn. 598, 299 N.W. 679 (1941); *Burton v. Eureka Bank*, 122 Miss. 355, 84 So. 247 (1920); *Campbell Const. Co. v. Saunders*, 230 Mich. 299, 203 N.W. 170 (1925); *City of Pasadena v. Estrin*, 212 Cal. 231, 298 Pac. 14 (1931); *Costello v. Schult*, 265 Wis. 243, 61 N.W.2d 296 (1953); *Croan v. Banner Ohio Transfer Co.*, 45 Ohio Law Abs., 65 N.E.2d 910 (1943); *Crutcher v. Scott Pub. Co.*, 42 Wash.2d 89, 253 P.2d 925 (1953); *Cunningham v. Spencer*, 111 Okl. 217, 239 Pac. 444 (1925); *Giumarra v. Harrington Heights*,

Inc., 33 N.J. Super. 178, 109 A.2d 695, affirmed 18 N.J. 548, 114 A.2d 720 (1954); *Glascock v. James*, 183 Va. 561, 32 S.E.2d 734 (1945); *Gragg v. Hall*, 164 Ga. 628, 139 S.E. 339 (1927); *Guardian Life Ins. Co. Of America v. Brackett*, 108 Ind.App. 442, 27 N.E.2d 103 (1940); *Hooker, Corser & Mitchell Co. v. Hooker*, 89 Vt. 383, 95 A. 649 (1915); *Johns v. Hudson*, 182 Ark. 1162, 34 S.W.2d 760 (1931); *Lewis v. Lee*, 75 Ind. App. 263, 130 N.E. 443 (1925); *Matthews v. Felps*, 515 So.2d 545 (1987); *Morrison v. Chapman*, 155 A.D. 509, 140 N.Y.S. 700 (1913); *Mystic Tailoring Co. v. Jacobstein*, 94 Colo. 306, 30 P.2d 263 (1934); *National Life & Acc. Ins. Co. v. Runnels*, 227 S.W.2d 351 (1950); *O'Connor v. Papertsian*, 309 N.Y. 465, 131 N.E.2d 883 (1956); *Reynolds v. Porter*, 59 N.M. 96, 279 P.2d 857 (1955); *Snyder v. Amermann*, 194 Or. 675, 243 P.2d 1082 (1952); *Southall v. Mickelson*, 68 N.D. 191, 277 N.W. 601 (1938); *State v. Southern Ry. Co.* 256 Ala. 195, 54 So.2d 295 (1951); *Tolchinsky v. Schiff*, 47 Misc. 371, 93 N.Y.S. 1073 (1905); *W.L. Reid Co. v. M-B Contracting Co.*, 46 Wash.2d 784, 285 P.2d 121 (1955); *Wilson v. Wilson*, 329 Mass. 208, 107 N.E.2d 195 (1952); *5 Corpus Juris Secundum 408-409, Appeal and Error*, § 908.

CONCLUSION AND PRAYER

This case does not involve a violation of Midwest's right to due process of law. Accordingly, Fields and Flamingo pray that the Court deny Midwest's Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review, and because the decision of the Supreme Court of Nevada was not in error.

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